No. 88-481

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

INDUSTRIAL STEEL PRODUCTS CO., INC. AND MOSHER STEEL COMPANY, PETITIONERS

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

CHRISTINE L. OWENS
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the Occupational Safety and Health Administration demonstrated probable cause, in accordance with *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978), for issuance of administrative warrants to conduct safety inspections of petitioners' steel plants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 845 F.2d 1330. The district courts' opinions (Pet. Supp. App. 1, 19-32) and the magistrates' recommendations (Pet. Supp. App. 2-18, 33-38) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1988. A timely petition for rehearing was denied on June 27, 1988 (Pet. App. B1-B2). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a court of appeals' decision holding that the Occupational Safety and Health Admin-

istration (OSHA) had demonstrated probable cause, in accordance with *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978), for issuance of administrative warrants to conduct safety inspections of petitioners' steel plants.

1. The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, authorizes the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce. See 29 U.S.C. 655. The OSH Act also empowers OSHA to enter and inspect workplaces to assure the provision and maintenance of safe and healthful working conditions. See 29 U.S.C. 657(a). As part of its general administrative plan for the enforcement of the Act, OSHA targets a specified number of employer establishments each year for safety inspections. OSHA selects establishments for these "programmed" inspections through specific neutral criteria that take into account, for example, whether the employer is engaged in a "high hazard" industry, whether the establishment's actual "lost work day injury" (LWDI) rate is below the national average, whether the establishment employs ten or fewer persons, and whether the establishment has been inspected in the current or previous two fiscal years. See Pet. App. A4-A6.

In 1986, OSHA scheduled programmed inspections of petitioner Mosher Steel Company's steel plant and petitioner Industrial Steel Products Company's (ISP's) steel fabrication plant (Pet. App. A2). Petitioners' plant representatives refused to consent to the inspections, and OSHA sought and obtained administrative warrants authorizing entry (*ibid.*). In each case, OSHA supported its warrant application with sworn affidavits by local OSHA officials and relevant documents describing the formulation of the agency's programmed inspection plan and its application to petitioners (*Ibid.*; Pet. Supp. App. 5, 23).

Petitioners, proceeding in separate courts, each sought to quash the warrants. The United States District Court for the Southern District of Texas adopted the magistrate's recommendation and denied Mosher's motion to quash. Applying the standards set forth in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978), the court agreed that the warrant was properly limited in scope, was "plainly based upon an adequate administrative inspection program of neutral criteria," and "involve[d] the random, nonarbitrary selection of Mosher Steel as its subject" (Pet. Supp. App. 17). The United States District Court for the Western District of Louisiana, also adopting a magistrate's recommendation, likewise denied ISP's motion to quash. It too found that OSHA's warrant application satisfied the *Barlow's, Inc.* probable cause standard. OSHA's application demonstrated that its inspection plan was based on "the reasonable and neutral criteria of high lost workday injury rates for a given category of manufacturers" (Pet. Supp. App. 28). The application also demonstrated "that [petitioner] was chosen randomly * * * from a list of establishments with a LWDI rate above the national average" (*id.* at 28-29).

2. The court of appeals consolidated the two cases and affirmed. Applying this Court's decision in *Barlow's, Inc.*, it concluded that the affidavits and other materials attached to the warrant applications "provided probable cause to issue the warrants" (Pet. App. A1). First, OSHA's inspection plan was based on "specific neutral criteria" from which a magistrate could "determine that the plan as a whole is susceptible of neutral, non-arbitrary application" (*id.* at A4, A6). The plan's neutrality was reflected in its identification and concentration on the largest, most dangerous businesses (*id.* at A6), combined with "the comprehensive inspection of some firms with low actual LWDI rates" (*ibid.*). Second, the warrant applications

contained "more than enough information" to support the magistrate's finding that petitioners were appropriately selected for inspection under the plan's neutral criteria (*id.* at A8-A9). They contained not only the statewide industry ranking reports and OSHA's instructions for developing the administrative plan, but also sworn detailed descriptions of how the plan was executed (*id.* at A9).

The court of appeals refused to examine evidence outside the warrants because petitioners had made no specific allegations of fraud or even arbitrariness (Pet. App. A3, A13-A14). The court observed that petitioners' statistics from local business directories suggested that some competitors may not have been included in OSHA's establishment lists, but it found these purported omissions to be insubstantial. The court concluded that OSHA could reasonably rely on national directories in compiling establishment lists because of the varying methodologies in local directories (*id.* at A12). The mere suggestion that "capricious additions and deletions could have been made at the local level" was insufficient to trigger an expanded inquiry (*id.* at A14).

ARGUMENT

The court of appeals correctly applied this Court's decision in *Barlow's, Inc.* to the particular facts here. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. There is, accordingly, no warrant for this Court's review.[1]

1. This Court held in *Barlow's, Inc.* that the Secretary of Labor must obtain a warrant to conduct a noncon-

[1] This Court has denied petitions for a writ of certiorari pressing arguments similar to those presented here. See *Mosher Steel Co.* v. *Brock*, No. 86-523 (Jan. 12, 1987); *Hackney, Inc.* v. *Brock*, 475 U.S. 1081 (1986).

sensual inspection of business establishments subject to the OSH Act (436 U.S. at 324-325). The Court stressed, however, that the Secretary need not demonstrate probable cause "in the criminal law sense" to obtain such warrants (*id.* at 320). Rather, "probable cause justifying the issuance of a warrant" may be based on evidence of an existing violation or "on a showing that 'reasonable legislative or administrative standards for conducting an inspection * * * are satisfied with respect to a particular [establishment]' " (*id.* at 321, quoting *Camara* v. *Municipal Court,* 387 U.S. 523, 538 (1967)). This probable cause showing contemplates "rather minimal limitations on [agency] action." *See* v. *City of Seattle,* 387 U.S. 541, 545 (1967)). See *Barlow's, Inc.,* 436 U.S. at 321, 323.

The court of appeals, like numerous other courts of appeals in markedly similar cases, correctly determined that the warrant applications here satisfied the *Barlow's, Inc.* probable cause standard.[2] First, the programmed inspection plan was derived from the specific, neutral criteria of injury rates, workforce size, and frequency of inspection (Pet. App. A6, A10). These criteria represent the types of objective factors that this Court has previously identified as indicative of a plan's neutrality and reasonableness. See *Barlow's, Inc.,* 436 U.S. at 321; *Camara,* 387 U.S. at 538.

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[2] The courts of appeals have repeatedly found that comparable warrant applications satisfy the *Barlow's, Inc.* probable cause requirement. See, *e.g., Pennsylvania Steel Foundry & Machine Co.* v. *Secretary of Labor,* 831 F.2d 1211, 1215 (3d Cir. 1987); *Donovan* v. *Trinity Industries, Inc.,* 824 F.2d 634, 636-637 (8th Cir. 1987); *Donovan* v. *Hackney, Inc.,* 769 F.2d 650, 652-653 (10th Cir. 1986), cert. denied, 475 U.S. 1081 (1986); *Donovan* v. *Wollaston Alloys, Inc.,* 695 F.2d 1, 5 (1st Cir. 1983); *Stoddard Lumber Co.* v. *Marshall,* 627 F.2d 984, 988-989 (9th Cir. 1980); *In re Establishment Inspection of Gilbert & Bennet Mfg.,* 589 F.2d 1335, 1342-1343 (7th Cir.), cert. denied, 444 U.S. 884 (1979).

Second, petitioners were "appropriately selected for inspection under the plan's neutral criteria" (Pet. App. A8). As the court of appeals explained, the affidavits and exhibits accompanying the warrant applications "contain[ed] a detailed description of how the plan was executed" and the precise reasons for inspection of petitioners' establishments (*id.* at A9-A10 (footnote omitted)). Based on these warrant applications, the magistrates plainly had "ample information" from which they could "decide that [petitioners] were appropriately chosen by an application of the plan's neutral criteria" (*id.* at A9).

2. Petitioners apparently do not contend that OSHA's programmed inspection plan was based on non-neutral factors, or that proper application of the plan could not result in their selection for inspection. Rather, they assert (Pet. 4, 5) that the court of appeals misapplied the *Barlow's, Inc.* probable cause standard by improperly imposing on them the burden of proving that the plan is discriminatory and that its discriminatory enforcement was intentional. Petitioners' objections reflect a misunderstanding of the court of appeals' decision. The court did not dispense with the *Barlow's, Inc.* requirement that OSHA affirmatively demonstrate probable cause for issuance of a warrant. The court simply held that the issuing magistrate is entitled to rely on OSHA's sworn representations of how application of the plan's neutral criteria resulted in selection of the particular business unless the party opposing the warrant rebuts OSHA's demonstration of probable cause through a specific factual showing (Pet. App. A13-A14). The court correctly noted that petitioners failed to make such a showing here (*id.* at A14).[3]

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[3] The court of appeals' holding is entirely in accord with *Barlow's, Inc.* The Secretary meets her burden of demonstrating probable cause by showing that the inspection plan is based on neutral criteria and

The court of appeals did not impose an improper burden on petitioners when it refused to look beyond the warrant application in determining whether the Secretary established probable cause. Ordinarily, review of a warrant application is confined to its four corners, and "a presumption of validity" attaches to the affidavit supporting the warrant. *Franks* v. *Delaware,* 438 U.S. 154, 171 (1978). To justify further inquiry, the party opposing the warrant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" (*id.* at 155-156; see also *id.* at 171). Moreover, the proponent must prove his "allegation of perjury or reckless disregard * * * by a preponderance of the evidence" (*id.* at 156).

Petitioners' allegations fall far short of what *Franks* requires. Petitioners point to supposed discrepancies between OSHA's establishment lists and the statewide business directories (Pet. 6). But the court of appeals correctly recognized that any such differences result from OSHA's appropriate use of national directories. See Pet. App. A12-A13. Beyond that, petitioners' assertion of omissions amounts to nothing more than a mere suggestion "that capricious additions and deletions could have been made at the local level" (Pet. App. A14). This suggestion is not enough to mandate the further inquiry that petitioners sought, and it is certainly not enough to call for this Court's review.

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that application of the plan resulted in the selection of a particular establishment for review. See 436 U.S. at 320. *Barlow's, Inc.* specifically eschews the imposition of unmanageable requirements on the Secretary (436 U.S. at 321), and plainly does not require, as petitioners suggest (Pet. 7), that the Secretary additionally must demonstrate that the plan is properly applied to every other establishment actually or potentially on the list (845 F.2d at 1337).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

CHRISTINE L. OWENS
Attorney
Department of Labor

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